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No. 87-1855

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RUSSELL A. MUTH, JR., Respondent,

versus

CENTRAL BUCKS SCHOOL DISTRICT,
DR. NEWMAN, THOMAS L., Superintendent
of the Central Bucks School District and

MARGARET A. SMITH/THOMAS K. GILHOOL, SECRETARY OF EDUCATION,
COMMONWEALTH OF PENNSYLVANIA, Petitioners

REPLY TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

RUSSELL A. MUTH, JR.
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Respondent
Pro Se

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QUESTIONS PRESENTED FOR REVIEW BY THE PETITIONER

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and Chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

LIST OF THE PARTIES

PETITIONER:

MARGARET A. SMITH/THOMAS K. GILHOOL, Secretary of Education of the Commonwealth of Pennsylvania

RESPONDENT(S):

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH

MEMORANDUM IN RESPONSE TO REQUEST TO RESPOND TO PETITIONER's WRIT OF CERTIORARI

REPLY TO QUESTION NUMBER ONE

The original plaintiff/current respondent, Russell A. Muth, Jr., has never been trained in the Law and/or taken any courses in a law school; thus, he does not feel he can add anything to what has all ready been said by fully trained members of the legal profession. But a response has been requested and will be executed below.

Counsels for the Commonwealth of Pennsylvania have repeatedly claimed the Secretary of Education and indirectly the Commonwealth of Pennsylvania have absolute immunity from the financial liability brought forth by the decision and order(s) of District Court Justice Daniel H. Huyett, III in Muth versus the Central Bucks School System, et al., because of the Eleventh Amendment of the United States Constitution.

Yet, the Education of All Handicapped Children Act of 1975 was specifically enacted in order to assure equal protection of the law (20 USCS, section 1400 (9), invoking the Fourteenth Amendment rights of the U.S. Constitution ("the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies --- with or without state action --- that interfere with Fourteenth Amendment rights" [383 U.S. at 762, 86 S.Ct at 1160]).

Did Congress effectively overide the states sovereign immunity in enacting the Education For All Handicapped Children Act of 1975 (20 U.S.C. 1400 to 1468)? The applicable principal is clear:

> The Eleventh Amendment is "necessarily limited by the enforcement provisions of section 5 of the Fourteenth

> Amendment," that is, by Congress' power "to enforce by appropriate legislation, the substantive provisions of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 [96 S.Ct. 2666, 2671, 49 L.Ed.2nd 614](1976).

The case which elucidates the most stringent demands upon whether or not the Eleventh Amendment rights are abrogated is Atascadero State Hospital v. Scanlon (473 U.S. ---, 105 S.Ct. 3142, 87 L.Ed.2nd 171 [1985]). The basic requirement of Atascadero is that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself". Unlike Section 504 of the Rehabilitation Act of 1973 (R.H.A.), which was the statute at issue in Atascadero, Congress stated in the preamble of the Education For All Handicapped Children Act of 1975 (E.H.A.) the following:

> It is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

In addition to this unmistakeable statutory language, and again in contrast to R.H.A., the Supreme Court has all ready discussed extensively the E.H.A's grounding on the Equal Protection Clause. In Smith v. Robinson, --- U.S. ---, 104 S.Ct. 3457, 82 L.Ed. 2nd 746, the Supreme Court affirmed the holding that E.H.A. was the exclusive scheme for vindicating handicapped children's rights to "a free appropriate public education as guaranteed by the Equal Protection Clause ... "Id. at 3468. The Court held in Smith:

> In light of the of the comprehensive nature of the procedures and guarentees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommondate the needs of each handicapped child, we find it difficult to believe that Congress meant to leave undisturbed the ability of a handicapped child to go directly into court with an equal protection claim to a free appropriate public education. (Id. at 3469)

In support of this determination, the Supreme Court pointed to the unambiguous statutory language of section 1400 (b)(9) and noted that the impetus behind the E.H.A. was two (2) federal cases establishing that a state's failure to provide to

handicapped children a free public education appropriate to their needs was a Constitutional violation (Smith v. Robinson, 104 S.Ct. at 3468; Rowley, 458 U.S. at 180 n. 2, 192-200, 102 S.Ct. at 3037 n. 2, 3043-3047, and H.R.Rep. No. 94-332 at 3-4, all referring to Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.C. 1972), and Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. 1972). Finally, it is clear that the E.H.A. creates a right, enforceable in federal court, to the free appropriate public education required by the statute (Board of Education v. Rowley, 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2nd. 690] 20 U.S.C., section 1415 (e)(2).

Because the plaintiff/respondent was never trained in The Law, he will use the point of view expressed in the volume Constitutional Law, 3rd edition by John E. Nowak, Ronald D. Rotunda and J. Nelson Young, 1986. In their volume, the authors point out "a private person may bring an equitable action to force a state officer to comply with federal law in the future even though they will be required to spend state funds to so comply" (page 50). The Eleventh Amendment does not grant the states true immunity, for it does not exempt them from the restrictions of federal law. The distinction had its genesis in Ex parte Young, (209 U.S. 123, 28 S.Ct. 441, 52 L.ed. 714 (1908). A Congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent. "The use of prospective relief by a federal court will be upheld even if it involves the ordering of the official to use state funds" (Constitutional Law, 3rd edition, page 51). Any case involving the Eleventh Amendment raises an intensely practical problem inherent in the concept of federalism. A state asserting an Eleventh Amendment defense is, in essence, challenging the right of the federal government to impose a monetary burdon on it. But the states have a duty to furnish certain "government" services, for example, education. Did the

Eleventh Amendment gives the states the power to "elect" between their immunity and continued provision of those services? Such a limitation would be, in itself, antithetical to harmonious federalism. "Although the state is the real party of interest, the Eleventh Amendment was never intended, nor held, to grant the states the ability to subvert the supremacy clause by granting immunity to the states or their officials from judicial orders to comply with federal law" (Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments. 75 Colum.L.Rev. 1413, 1445-56, 1455-58). If the Supremacy Clause of Article V is to have any meaning, federal courts must enforce rights against non-complying states created by these "direct command" provisions. "Similarily, the Supreme Court unanimously held that state officers could be subject to a federal cause of action, and ordered by a federal court, to force them to disburse state funds to institute educational programs in connection with a suit to desegregate public schools (Constitutional Law, 3rd edition, page 51)(Milliken v. Bradley[Milliken II] - 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2nd 745 [1977], on remand 460 F. Supp. 299 [E.D.Mich.1978], remanded 620 F.2nd 1143 [6th Cir. 1980]certiorari denied 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2nd 89 [1980]. Yes, the Supreme Court views the Eleventh Amendment as a bar to federal suits against the state when the suit seeks retroactive relief. One of the amendments underlying purposes was to prohibit the courts from imposing monetary burdons on the states for past actions, reasoning that if the courts could impose liability retroactively, state fiscal policy would be seriously upset; because a state would have to appropriate additional funds to pay for liabilities incurred in prior fiscal years when it was unaware of the need for such an allocation. But the Ex parte Young exception to this principal allows courts to hear suits against state officials if the suit seeks to force them to conform their conduct to federal law; ever since the case of Ex parte Young, federal courts clearly have had the power to

order state officials to comply with federal law in the future. Prospective judicial rulings contain a direct limitation on the degree of hardship imposed upon the states, i.e. the court only determines that certain past practices are not in conformity with the federal law and that the states must comply with that law in the future. Thus, the court imposes no penalty upon the state for their past actions and does not accentuate the clash between the two sovereigns. Therefore, the granting of prospective relief would comport with --- if not further --- harmonious federal relations. Finally, the Fourteenth Amendment establishes federal court jurisdiction to issue prospective relief as is necessary to force the states to conform their laws to the principals of the Fourteenth Amendment (... "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

In Burlington (Burlington School Comm. v. Dept. of Education, --- U.S. ---, 105 S.Ct. 1966 [1985], the Supreme Court addressed the issue on whether or not "the potential relief available under section 1415(e)(2) includes reimbursement to parents for private school tuition and related expenses and whether section 1415(e)(3) bars such reimbursement to parents who reject a proposed I.E.P. and place a child in private school without the consent of local school authorities". The Supreme Court arrived at the following conclusion:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate relief would include a prospective injunction directing the school officials to develop and implement at public expenses an IEP placing the child in a private school.

In this instant case, the hearing officer determined in his report of October 31, 1983 that Robert Alexander Muth was not

receiving a free appropriate public education up through September, 1983: 1.[Findings of Fact:] "The I.E.P. and Notice of Recommended Assignment do not describe an appropriate program for Alexander's learning disabilities" and 2. [Conclusions of Law:] 2. "The program advocated by the school district is appropriate relative to classification but inappropriate relative to effectiveness and efficiency as required by 22 Pa. Code CH-13.11 (a)(b)." Just after the start of the 1983/1984 school year, the parent, Russell A. Muth, Jr., faced with the tortuously slow process of having his son's I.E.P. revised and then implemented, elected to remove his minor child from public school, the Lenape Junior High School of the Central Bucks School District, and placed his son into a private school, the Landmark School, in Prides Crossing, Massachusetts, where he would receive immediately the appropriate educational program the child needed, having arrived at the same basic conclusion developed by the hearing officer, i.e. the program offered by the Central Bucks School District was woefully inadequate/wanting. Since "Delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development" [121 Cong. Rec. 37416 (Nov. 19, 1975 -- remarks of the principal author of Public Law 94-142)], the parent sought to mitigate the damage from the previous inappropriate programs given to his son --- by placing him in a program mandated by the child's physician, William C. Adamson, M.D. (board certified neurologist and psychiatrist --- learning disability specialist).

A legal imbroglio ensued --- lasting for well over a year. The compensation granted to the plaintiff by Judge Huyett was the recovery of the funds the plaintiff expended while the new I.E.P.'s were being developed and for the inordinate amount of time the Commonwealth of Pennsylvania used and abused the legal process, adding substantial delay, i.e. fourteen months to a process that should have taken --- at most --- two and a half

months; in this particular case, federal law (E.H.A.) granted "equity powers" to prevent recapture of the case by the state or local agency so that protracted delay could be avoided. Both the Commonwealth of Pennsylvania and the Central Bucks School District were fully aware of their responsibilities toward the disabled child. The compensation that the Commonwealth of Pennsylvania and the Central Bucks School District are being asked to pay for is prospective (forward) relief for the interval of time when a "free appropriate public education" program was held in abeyance and for the malignantly excessive time used by these governmental entities to create "a free appropriate public education" program for Robert Alexander Muth.

Finally, the legal imbroglio produced several I.E.P.s, which were reviewed by the lower court system(s). Unfortunately not one of those I.E.P.s conforms to the terms and conditions specified in the Code of Regulations, Title 34, parts 300 to 301; nowhere in the previously mentioned I.E.P.s --- is there a schedule showing regular psychological (i.e. psychotherapeutic) counselling specified by the hearing officer (see Writ of Certiorari, number 87-7147 filed by the original plaintiff/respondent).

REPLY TO QUESTION NUMBER TWO

Counsel(s) for the petitioner(s) point out "the Secretary of Education is a high public official appointed by the Governor in accordance with the Constitution of the Commonwealth, ..., whose function is to establish and implement statewide educational policy" (page 48 and 49, Petition for a Writ of Certiorari No 87-1855). Can a political appointee deliver an impartial/objective review of a due process hearing? Secretary Margaret A. Smith/Thomas L. Gilhool came to his or her position as head of the Pennsylvania Department of Education in part to administer and in part to insure the discharge of a political agenda; hence, he or she cannot really function in the impartial role mandated

by Public Law 94-142, section 1415(C).

Conclusion(s)

The most critical question raised by Secretary Gilhool and/or the Commonwealth of Pennsylvania in their Petition for Writ of Certiorari becomes whether the combination of the legislative history and the statement in 20 U.S.C., section (b)(9) and the 1986 amendment to 20 U.S.C., section 1415(e)(4)(g) [Public Law 99-372, 100 Stat. 796] constitute an override of the sovereign immunity granted to the States by the Eleventh Amendment --- by activating the due process rights granted by section five (5) of the Fourteenth Amendment. The respondent feels the Supreme Court has spoken clearly in the past (Smith v. Robinson, ___U.S. ___, 104S.Ct. 3457, 82L.2d 746 [1984]) suggesting no reason exists for the Supreme Court to grant certiorari on this particular issue. Lastly, petitioner(s) Margaret A. Smith/Thomas K. Gilhool are political appointee(s) with a political agenda to discharge; hence, he or she cannot function impartially as required by Public Law 94-142. Thus, Certiorari should be denied in regard to the Secretary of Pennsylvania's role in due process hearings or their review.

Respectfully submitted,

Russell A. Muth, Jr. (Respondent/Original Plaintiff)